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In The

Supreme Court of the United States

October Term, 1997

SUN-DIAMOND GROWERS OF CALIFORNIA,

Cross-Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Cross-Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a court deprives a criminal defendant corporation of due process of law when concluding that a *prosecutor's* classification of an entity as a "victim" of an alleged fraud precludes a finding by a jury that the entity was actually a perpetrator under vicarious liability principles — thereby allowing the *prosecutor*, rather than the jury, to resolve a critical issue of fact?

2. In a prosecution for "honest services" fraud under 18 U.S.C. §§ 1343 and 1346, whether the government satisfies its burden of establishing the defendant's intent to cause "identifiable harm" to his "victim" — *not* by offering evidence that the fraudulent scheme itself contemplates any harm to the victim — but rather, by merely offering evidence that the alleged victim would likely suffer harm if "word of the scheme got out," a standard that would criminalize virtually every breach of fiduciary duty?

PARTIES TO THE PROCEEDINGS

The Opposition to Petition for Certiorari filed on August 28, 1998 accurately reflects the parties to these proceedings, as well as Cross-Petitioner's compliance with Rule 29.6.

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OPINIONS BELOW

The underlying March 20, 1998, decision by the United States Court of Appeals for the District of Columbia Circuit is reported at 138 F.3d 961 (D.C. Cir. 1998), and is attached to the Petition for Writ of Certiorari filed by the Independent Counsel as Petition Appendix ("Pet. App.") A. On June 18, 1998, the Court of Appeals denied the parties' respective petitions for rehearing and suggestions for rehearing *in banc*. Those Orders are attached to the Independent Counsel's petition as Pet. App. B. The Court of Appeals' Order dated July 17, 1998, amending the court's March 20, 1998, decision is attached to Respondent's Brief In Opposition as Opposition Appendix A. A copy of the September 9, 1996 decision by the United States District Court for the District of Columbia denying Sun-Diamond Growers of California's ("Sun-Diamond") Motion to Dismiss the Indictment is reported at 941 F. Supp. 1262 (D.D.C. 1996), and is attached to the Independent Counsel's petition as Pet. App. C. On May 13, 1997, the District Court denied Sun-Diamond's Renewed Motion for Judgment of Acquittal on Counts III-IX. *See* 964 F. Supp. 486 (D.D.C. 1997).

JURISDICTIONAL STATEMENT

This Court has jurisdiction to review the final judgment of the Court of Appeals under 28 U.S.C. § 1254(1). The Court of Appeals' decision is dated March 20, 1998, and the court denied the parties' respective petitions for rehearing and suggestions for rehearing *in banc* on June 18, 1998. This cross-petition has been filed within ninety days after entry of the Court of Appeals' judgment. *See* Sup. Ct. R. 13.1.

STATUTORY PROVISIONS INVOLVED

This petition construes the federal wire fraud statute, 18 U.S.C. § 1343, which provides in pertinent part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than five years, or both. . . .

Congress supplemented this statute with 18 U.S.C. § 1346, which states that: "For the purposes of this chapter, the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services."

STATEMENT OF THE CASE

Sun-Diamond is a California agricultural cooperative owned by four individual member cooperatives,[1] which in turn are collectively owned by approximately 5,000 individual growers. The conduct at issue stems from the relationship between Sun-Diamond's former Senior Vice President, Richard Douglas ("Douglas"), and former Secretary of Agriculture Michael Alphonso Espy ("Espy"). It is undisputed that while Douglas was an in-house lobbyist for the company, the relationship between Douglas and Espy extended beyond business acquaintances. Douglas "had a long-time friend in Mike Espy — the two had gone to college together at Howard University and had stayed close in the years since." Pet. App. 2.

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1. The Court of Appeals erroneously stated that Sun-Diamond is owned by five member cooperatives. *See* Pet. App. 1-2. One of the five member cooperatives has no ownership interest in Sun-Diamond.

On June 13, 1996, a grand jury, acting at the behest of the Independent Counsel,[2] returned a nine-count indictment against Sun-Diamond. Counts I and II of the indictment charged that Sun-Diamond, through Douglas, gave approximately $9,000 in illegal gratuities to Espy. *See* 18 U.S.C. §§ 2, 201(c)(1)(A); *see also* Pet. App. 4.

Unrelated to the unlawful gratuity allegations, Counts III and IV alleged that Douglas and James H. Lake ("Lake") together devised a scheme to defraud Lake's public relations firm, Robinson, Lake, Sawyer & Miller ("RLSM")[3], and its parent, Bozell Worldwide, Inc. ("Bozell"), in violation of the federal aiding and abetting and wire fraud statutes.[4] 18 U.S.C. §§ 2, 1343, 1346. Lake was a founding partner of RLSM. One of Lake's largest clients was Sun-Diamond, which paid RLSM a monthly retainer of $20,000 during the relevant time period. Pet. App. 14. Douglas, who maintained an office at RLSM, supervised Sun-Diamond's relationship with Lake and his firm. *Id.*

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2. On September 9, 1994, the Special Division for the Appointment of Independent Counsels appointed Donald C. Smaltz Independent Counsel to investigate alleged violations of the federal gratuity statute by Espy. *See* 28 U.S.C. § 593(b).

3. RLSM later became the Sawyer, Miller Group. *See* Pet. App. 14 n.7.

4. Counts V through IX, which rely entirely upon the allegations contained in Count III, alleged that Sun-Diamond made illegal corporate and conduit campaign contributions in violation of the Federal Election Campaign Act ("FECA"). *See* 2 U.S.C. §§ 441b(a), 441f, 437g(d)(1)(A); 18 U.S.C. § 2. Sun-Diamond does not challenge in this cross-petition the convictions concerning Counts V through IX.

The genesis of the alleged scheme to defraud was the campaign debt amassed by Henry Espy in his unsuccessful quest to claim his brother's vacated congressional seat. According to the indictment, Douglas and Lake together devised a scheme that would enable them to contribute $5,000 of Sun-Diamond's funds to the Henry Espy for Congress campaign. At trial, the Independent Counsel relied exclusively upon the testimony of Lake to prove the existence of the scheme. *Id.*

Lake testified that he was asked by Douglas to assist in raising money to help retire Henry Espy's campaign debt. After offering to donate $1,000 — the maximum permissible individual contribution — Lake agreed to raise another $4,000 by soliciting four other RLSM officers to make similar contributions. Pursuant to Lake's requests, three RLSM officers each made $1,000 contributions. Pet. App. 14-15. But because one potential contributor refused to participate in the alleged scheme due to its illegality, Lake raised a total of only $4,000 rather than the $5,000 originally contemplated.

Lake thereafter coordinated with Douglas to secrete Sun-Diamond's funds out of the company to reimburse Lake and his colleagues for their respective contributions. They accomplished this task by creating a fictitious invoice from RLSM to Sun-Diamond for an annual charity dinner to which Sun-Diamond had contributed in the past.[5] Pet. App. 15. First, Lake had his staff prepare a $5,000 billable expense report causing Bozell to reimburse Lake for fronting the $4,000 used

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5. Both Lake and Douglas knew that this scheme was unlawful because under FECA: (1) corporations cannot make political contributions; and (2) a contributor cannot make a contribution in the name of another. Pet. App. 14-15; *see also* 2 U.S.C. §§ 441b(a), 441f, 437g(d)(1)(A).

for his colleagues' and his respective contributions.[6] Then, Bozell/RLSM sent to Sun-Diamond the monthly invoice, which included, among other things, the fictitious $5,000 expense for the "Joint Center Dinner." Douglas approved (purportedly) on behalf of Sun-Diamond, and the company ultimately paid, the entirety of this invoice. *Id.* No one at Sun-Diamond other than Douglas reviewed the invoice or otherwise knew or had reason to believe that Bozell/RLSM was invoicing Sun-Diamond for a phony expense. Pet. App. 16-17. By causing Sun-Diamond to pay the phony expense, Douglas and Lake assured that RLSM/Bozell was made whole, while simultaneously causing Sun-Diamond to reimburse, unwittingly, Lake and his colleagues for their contributions.[7]

The Independent Counsel charged Sun-Diamond with five misdemeanors (Counts V-IX) under the FECA, four conduit contributions and one corporate contribution. 2 U.S.C. §§ 441b(a), 441f, 437g(d)(1)(A). The Independent Counsel, however, also claimed that two wire communications during the course of the alleged scheme gave rise to felony offenses. The wire communication underlying Count III was a message left by Douglas at Lake's office that he "needed to speak" with Lake. Indictment, Count III at ¶ 22. The use of the wire giving rise to Count IV was RLSM's transmission via electronic mail of the false expense report to Bozell. *Id.*, Count IV at ¶ 2. To support the purported "scheme to defraud," the indictment alleged that Sun-Diamond deprived Bozell, albeit temporarily,

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6. Lake pocketed the remaining $1,000. Pet. App. 15-16.

7. Lake himself freely acknowledged that Sun-Diamond was a *victim* rather than a *perpetrator* of the scheme. He testified that the intent of the scheme was not to further the interests of Sun-Diamond but rather to "defraud" and "deceive" Sun-Diamond by causing it to cover unwittingly the contributions of others. Joint Appendix filed with the Court of Appeals ("J.A."), Tab 3 at 432, 469.

of $5,000 and further deprived both Bozell and RLSM of the honest services of Lake. *See* Pet. App. 16.

The Independent Counsel characterized RLSM and Bozell as the defrauded victims even though Lake had knowledge of every aspect of the scheme, participated in the scheme, and was effectively the "engine" that pulled the train. Indeed, while the Independent Counsel portrayed RLSM and Bozell as victims in the Sun-Diamond indictment, the Independent Counsel had earlier threatened to prosecute those entities for the acts of their partner and agent. That the Independent Counsel actually considered the conveniently-found "victims" criminally liable for the scheme is reflected in an earlier-reached plea agreement with Lake, wherein the Independent Counsel specifically reserved to himself the right to prosecute RLSM and Bozell for Lake's conduct should Lake fail to cooperate or otherwise fail to adhere to the terms of the plea agreement. *See* J.A., Tab 10 (letter dated October 23, 1995 from D. Smaltz to P. Cacheris) at 3. The government therefore put itself in the untenable position of arguing to the Sun-Diamond jury that Bozell and RLSM were "victims" while simultaneously threatening both with prosecution for the very same scheme. *See, e.g.*, Brief for Appellant (filed September 15, 1997) at 27-29.

On September 24, 1996, the jury found Sun-Diamond guilty of Counts I and III through IX, and acquitted Sun-Diamond of Count II. The District Court denied from the bench Sun-Diamond's September 16, 1996 Motion for Judgment of Acquittal on all nine counts. J.A., Tab 3 at 714-18, 753-54. On May 13, 1997, the District Court denied Sun-Diamond's Renewed Motion for Judgment of Acquittal on Counts III-IX. *See United States v. Sun-Diamond Growers of California*, 964 F. Supp. 486 (D.D.C. 1997).

On March 20, 1998, the Court of Appeals unanimously reversed and remanded Sun-Diamond's conviction on Count I of the indictment (alleging unlawful gratuities given to Espy), holding that the gratuity statute "mean[s] what it says" in that the government must prove at trial some relationship or connection between the gifts and one or more official acts. Pet. App. 3-14. Although recognizing that "Sun-Diamond does look more like a victim than a perpetrator, at least on the fraud charges," Pet. App. 16, the Court of Appeals nonetheless affirmed the convictions on Counts III and IV (alleging wire fraud) and V through IX (alleging FECA violations). Finally, the court vacated the District Court's sentence. *See* Pet. App. 25-31.

SUMMARY OF THE ARGUMENT

The Court of Appeals established a new — and improperly reasoned — corporate criminality doctrine in general, federal common law when it held that corporate imputation rules "need not be, and indeed are not . . . the same on both the perpetrator and victim sides." Pet. App. 18. The Court of Appeals' attempt to articulate distinct rules of imputation for the perpetrator and the victim puts the proverbial cart before the horse. That is, the Court of Appeals set forth different standards of imputation for the perpetrator and the victim but failed to explain how the fact finder determines who is the perpetrator and who is the victim. Instead, the Court of Appeals *assumed* the correctness of the *prosecutors'* labels, *assumed* that RLSM and Bozell were victims, and, on this basis, declined to impute the knowledge and conduct of Lake and other officers to their employers. As shown below, the Court of Appeals' decision misapplies general principles of agency law, rests upon a logical fallacy and has serious implications in the vicarious liability context, all of which charts a dangerous course in federal criminal practice at the expense of fairness in the due process of law.

The Court of Appeals also erred when concluding that the reasonable foreseeability of the mere discovery of the fraud, and the likely consequences thereof, is sufficient to satisfy the "identifiable harm" standard of "honest services" fraud, 18 U.S.C. § 1346. The holding that any harm resulting from the *possible discovery of the fraud* satisfies the "identifiable harm" element criminalizes virtually every breach of fiduciary duty in the private context because harm resulting from the discovery of an "honest services" fraud is virtually always reasonably foreseeable. This consequence conflicts with the efforts made by every federal circuit addressing this issue to narrow the scope of § 1346 to cover only the most aggravated, fraudulent conduct occurring in the private context; ordinary breaches of fiduciary duty are more properly addressed in the civil forum.

To affirm Counts III and IV, the Court of Appeals adopted imputation principles never before recognized by this Court or by any other federal court, and applied the "honest services" doctrine far beyond what either this Court or any other federal court has heretofore found to be appropriate. Given the wide application of imputation principles in American jurisprudence, and the equally wide application of the "honest services" doctrine in the criminal arena, this Court should grant the cross-petition and redress the Court of Appeals' departure from the prevailing case law.

ARGUMENT

This Court has recently turned its attention to the propriety of imputing civil liability onto those not directly responsible for actionable conduct. *See Burlington Indus. v. Ellerth*, __ U.S. __, 118 S. Ct. 2257, 2266-70 (1998); *Faragher v. City of Boca Raton*, __ U.S. __, 118 S. Ct. 2275, 2284-94 (1998). Questions regarding the appropriate standard for imputation are of critical importance both because of the frequency with which they are

addressed in courtrooms around the country, and because conduct improperly imputed to companies like Sun-Diamond can cause losses in the millions of dollars — in lost sales, criminal fines, debarment, reputation, etc. — losses which, in most cases, impact shareholders who are entirely innocent of the alleged wrongdoing.

The instant case, which concerns the appropriate rules for imputation in the criminal context, cries out for further review, and for relief. The jury, imputing Douglas's conduct to Sun-Diamond, convicted Sun-Diamond of defrauding RLSM and Bozell. The jury reached this verdict even though RLSM's and Bozell's partner and agent, Lake, and three other officers of RLSM, actively participated in the scheme. A fourth RLSM officer declined to participate because it was unlawful, but nonetheless did nothing to intervene. In contrast, the evidence was undisputed, and the Court of Appeals observed, that no one at Sun-Diamond, save Douglas, knew of the scheme. In fact, Sun-Diamond was convicted even though the government's witness, Lake, the only witness to testify about the scheme, acknowledged that he "deceiv[ed]" Sun-Diamond, and that, in his view, Sun-Diamond was "defrauded." J.A., Tab 3 at 432, 469. It is little wonder that the Court of Appeals, while affirming the fraud convictions, candidly opined that "Sun-Diamond does look more like a victim than a perpetrator[.]" Pet. App. 16.

As shown below, this Court should grant Sun-Diamond's cross-petition to redress an injustice, and to set forth definitively the appropriate rules governing the imputation of an agent's conduct to his principal in criminal cases.

I.

CORPORATE IMPUTATION PRINCIPLES MUST BE APPLIED UNIFORMLY TO ALL PARTICIPATING AGENTS AND PRINCIPALS.

A. The Court of Appeals' Novel Imputation Analysis Is Unsupported And Defies Reason.

The specific issue here is whether the jury properly convicted Sun-Diamond of defrauding Lake's employers because in doing so the jury had to impute Douglas's conduct to Sun-Diamond *but not* impute Lake's conduct to his employers.[8] As discussed below, the jury's (and the Court of Appeals') conclusion is insupportable as a matter of law because even if the jury properly imputed Douglas's conduct to Sun-Diamond, Lake's conduct and knowledge would be, *a fortiori*, imputable to his employers, rendering the purported "victims" knowing participants.

In approaching the question of vicarious criminal liability, the Court of Appeals acknowledged that Douglas and Lake *both* "occupied high-level management positions in their respective firms, and both men's firms sought to establish good relations with Secretary Espy." Pet. App. 18. The evidence also demonstrated that at least five members of Lake's firm knew about the unlawful contributions to Henry Espy (four of whom in fact made the unlawful contributions), but *no one at Sun-Diamond other than Douglas knew either about the contributions or that Lake's invoice to Sun-Diamond was*

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8. A jury in the United States District Court for the Northern District of California *acquitted* Douglas on charges essentially identical to Counts III through IX. *See United States v. Douglas*, 996 F. Supp. 969 (N.D. Cal. 1998).

fictitious and fraudulent. Pet. App. 16-17. In addition to seeking to establish good relations with Espy, Lake also presumably sought on behalf of his purportedly defrauded firm to maintain good relations with Douglas and Sun-Diamond, one of Lake's long-standing clients.

Faced with the paradox of explaining how Douglas's conduct could be imputed to Sun-Diamond and Lake's conduct *not* imputed to his firm, the Court of Appeals created a distinction no other Circuit has seen fit to adopt:

> Even assuming the evidence showed the balance of private and corporate purpose in Douglas's and Lake's motivation to be identical, *Sun-Diamond's argument rests on a faulty assumption — that the imputation rules must be the same on both the perpetrator and victim sides. They need not be, and indeed are not.* Imputation is a legal fiction designed to assist in the allocation of liability, not a literal description of the state of a principal's knowledge. The law imputes the wrongdoer's conduct to the corporation in order to encourage monitoring, but it is not at all clear that imputation on the other side of the equation would be useful in eliciting additional caution on the part of would-be fraud victims. . . . Indeed, Congress's adoption of 18 U.S.C. § 1346, specifying that the term "scheme or artifice to defraud," as used in various federal criminal fraud statutes, should include schemes to deprive a principal "of the intangible right of honest services," is hard to square with an imputation rule on the victim side as broad as the one governing corporate criminal responsibility.

Id. (emphasis added). The Court of Appeals' distinction is fundamentally flawed.

Both civil and criminal corporate imputation rules are based upon general agency principles — *i.e.*, whether the agent acted within the scope of the employment — not victim or perpetrator status.[9] *See, e.g., United States v. One Parcel of Land Located at 7326 Highway 45 North*, 965 F.2d 311, 316 (7th Cir. 1992) ("Corporate criminal and civil cases reflect the application of agency principles. Only knowledge obtained by corporate employees acting within the scope of their employment is imputed to the corporation.") (footnote and citations omitted); *cf. Burlington Indus.*, 118 S. Ct. at 2266 ("The Restatement defines conduct, including an intentional tort, to be within the scope of employment when 'actuated, at least in part, by a purpose to serve the [employer],' even if it is forbidden by the employer.") (quoting Restatement (Second) of Agency §§ 228(1)(c), 230 (1957)). Sun-Diamond has been unable to find, and the Court of Appeals does not cite, any authority describing the purported distinction between perpetrators and victims in applying corporate imputation principles.

Assuming *arguendo* that the evidence is sufficient to impute Douglas's conduct to Sun-Diamond, then Lake's conduct must be imputed to his employers under general principles of agency law. Of course, if Lake's conduct *is* imputed to his employers, they cannot be "victims," and the fraud convictions cannot stand because no one was defrauded.

B. The Court of Appeals' Holding Raises Serious Due Process Concerns.

Perhaps even more fundamentally, the Court of Appeals' conclusion that criminal corporate imputation is based upon the company's victim or perpetrator status begs the ultimate

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9. Courts apply stricter agency principles in criminal cases. *See, e.g.*, Pet. App. 16 n.9.

question of *whether* the company is in fact a victim or a perpetrator. The Court of Appeals acknowledges that "Sun-Diamond does look more like a victim than a perpetrator, at least on the fraud charges." Pet. App. 16. Apparently bound by *the prosecutor*'s initial classification of Sun-Diamond as a perpetrator, however, the court applied its corporate perpetrator imputation rules to impute Douglas's conduct to Sun-Diamond without imputing Lake's conduct to his employers. This holding thus vests the prosecutor with the power of determining, and manipulating, corporate imputation rules. Had the Independent Counsel brought a case against Lake's firm alleging Sun-Diamond as the *victim* of the fraud, the opposite result would have been inevitable — *i.e.*, Douglas's conduct would *not* be imputed to Sun-Diamond but Lake's conduct *would* be imputed to his employers.[10]

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10. As noted *supra*, the Independent Counsel has retained the right to prosecute Lake's firm (the purported victim here) for Lake's conduct. *See* Brief for Appellant at 27-29 (filed September 15, 1997). As the First Circuit opined, prosecutorial position-switching casts a long shadow on the prosecution:

> [An] inconsistency [in litigation positions] is troubling where its source is the prosecutorial arm of the federal government. It is one thing for private counsel to characterize events in contrasting ways in two separate litigations, because the counsel there is required under our adversary system to defend its clients in the most vigorous fair manner possible—counsel is expected to put the best possible gloss on a client's case. The function of the United States Attorney's Office, however, is not merely to prosecute crimes, but also to make certain that the truth is honored to the fullest extent possible during the course of the criminal prosecution and trial.
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> * * * *

(Cont'd)

It is, of course, the government's burden to prove each element of the crime charged beyond a reasonable doubt. Here, the government had to show that Sun-Diamond defrauded somebody, and the "somebody" the government alleged was Lake's employers. But under the Court of Appeals' decision, based only on the Independent Counsel's allegations, Lake's employers are *presumed* victims and not participants. What more could Sun-Diamond have shown to rebut this presumption? The record demonstrated, and it was uncontested, that Lake, a founding and name partner of RLSM, knew of and participated in the scheme. *See* Pet. App. 14-16. Four other officers of the company knew about the scheme to make unlawful, political contributions. *See* Pet. App. 15. Three of these company officers, including the general manager of RLSM, actually made unlawful, conduit contributions to the Henry Espy for Congress Committee, *i.e.*, Lake reimbursed these three officers for their respective contributions. *Id.* Lake and his colleagues acted to further their employers' business interests. *See* Pet. App. 18. Members of Lake's staff prepared the fraudulent Sun-Diamond invoice for the Joint Center Dinner — with no backup documentation or receipts. *See* Pet. App. 15. Lake himself testified that he "deceived" and "defrauded" Sun-Diamond.

(Cont'd)

> Thus, it is disturbing to see the Justice Department change the color of its stripes to such a significant degree, portraying an organization, individual, or series of events variously as virtuous and honorable or as corrupt and perfidious, depending on the strategic necessities of the separate litigations.

United States v. Kattar, 840 F.2d 118, 127 (1st Cir. 1988); *see also Jacobs v. Scott*, 513 U.S. 1067, 1070 (1995) (Stevens, J., dissenting from denial of certiorari) ("I have long believed that serious questions are raised 'when the sovereign itself takes inconsistent positions in two separate criminal proceedings against two of its citizens.' ") (citations omitted).

The flaw of the Court of Appeals' reasoning lies not in its declaration that the imputation rules are different for the perpetrator and the victim. Rather, it is in using that legal fiction for allocating criminal liability to identify the victim and the perpetrator in the first place. The Court of Appeals' complete deference to the Independent Counsel's classification of Sun-Diamond as a perpetrator stripped Sun-Diamond of a legal defense to the fraud counts, *i.e.*, the purported victim of the fraud was actually a perpetrator. The search for justice cannot be so cavalier as to assume the correctness of a prosecutor's classification of a company as victim or perpetrator. Indeed, to accord the prosecutor the right to label a company a perpetrator or a victim preordains the result since the Court of Appeals' imputation rules flow from the prosecutor's characterization. This characterization strips the fact-finding function both from the fact finder, and of all integrity, taking away from the jury the very issue upon which it is charged to pass judgment. *See, e.g.*, *United States v. Gaudin*, 515 U.S. 506, 514-15 (1995) ("the jury's constitutional responsibility is not merely to determine the facts, but to apply the law to those facts and draw the ultimate conclusion of guilt or innocence").

The Court of Appeals' holding creates a fundamental error in the analysis of agency principles underlying corporate, vicarious liability. As the application of corporate imputation principles — and thus the *criminal* disposition of corporations (and all its consequences, *i.e.*, debarment, financial losses to innocent shareholders, etc.) — should be left to general agency principles and *not* the whim of the prosecutor, and the imputation principles adopted by the Court of Appeals have not been adopted by any other federal court, Supreme Court review of this issue is warranted.

II.

THE REASONABLE FORESEEABILITY OF THE *DISCOVERY* OF A FRAUD IS NOT SUFFICIENT TO SATISFY THE "IDENTIFIABLE HARM" STANDARD FOR A CONVICTION BASED UPON SO-CALLED "HONEST SERVICES" FRAUD.

The Court of Appeals' analysis of so-called "honest services" fraud conflicts with well-established federal precedent and raises serious legal concerns warranting Supreme Court attention. To convict a defendant under the wire fraud statute, 18 U.S.C. § 1343, the government must prove: (1) the formation of a "scheme to defraud"; and (2) an interstate wire communication furthered the scheme. *Cf. Pereira v. United States*, 347 U.S. 1, 8 (1954) (construing elements of mail fraud).[11] This Court, in *McNally v. United States*, 483 U.S. 350 (1987), construed the legislative history of the mail fraud statute to hold that "the original impetus behind the mail fraud statute was to protect the people from schemes to deprive them of their money or property" but *not* "to the intangible right of the citizenry to good government," *i.e.*, honest services. *Id.* at 356; *see also Carpenter v. United States*, 484 U.S. 19, 27 (1987).

Congress responded to *McNally* the very next year by promulgating 18 U.S.C. § 1346, which defines "scheme or artifice to defraud" as including "a scheme or artifice to deprive another of the intangible right of honest services." Consequently, § 1346 reinstated the pre-*McNally* case law pertaining to mail and wire "honest services" fraud.[12] *See, e.g.*,

11. The elements of a "scheme to defraud" in wire and mail fraud are identical. *See, e.g., Carpenter v. United States*, 484 U.S. 19, 25 n.6 (1987).

12. Despite § 1346, the ongoing effects of *McNally* are unclear. (Cont'd)

United States v. Frost, 125 F.3d 346, 364 (6th Cir. 1997); *United States v. Czubinski*, 106 F.3d 1069, 1076 (1st Cir. 1997).

As explained below, the Court of Appeals departed from the federal circuit courts' uniform interpretation of "honest services" fraud when it essentially expanded the scope of the mail and wire fraud statutes to encompass all breaches of fiduciary duty in the private context. Accordingly, the Court of Appeals' holding not only conflicts with clearly-delineated precedent established by the federal circuits, but also raises important federal concerns regarding the breadth of the mail and wire fraud statutes.

A. The Court of Appeals' Holding Creates A Conflict Among The Circuits.

The government in an "honest services" fraud case must prove that the defendant: (1) intended to deprive the victim of the honest services of an employee; *and* (2) reasonably contemplated some "identifiable harm" to the victim separate and apart from the infidelity of the employee. *United States v. Lemire*, 720 F.2d 1327, 1337 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1226 (1984); *see also United States v. Cochran*, 109 F.3d 660, 667-68 (10th Cir. 1997); *United States v. Jain*, 93 F.3d 436, 441-42 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 2452 (1997).

Although the D.C. Circuit in *Lemire* recognized that intangible harm — such as a deprivation of privacy, an attempt

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(Cont'd)
As one scholar acknowledged, "it is not necessarily clear that 'honest services' embraces all the intangibles that government prosecutors might want to advance as bases for Section 1341 [or § 1343] prosecutions." B.J. George, Jr., Contemporary Federal Criminal Practice § 6-58 (2d ed. 1993).

to gain sexual favors or misappropriation of trade secrets — can satisfy its "identifiable harm" standard, the court made clear that Congress did not intend to "criminalize any intentional undisclosed breach of duty to an employer." *Id.* at 1336 & n.11. When explaining that "[e]mployee loyalty is not an end in itself, it is a means to obtain and preserve pecuniary benefits for the employer," 720 F.2d at 1336, the court expressed concern that criminalizing all acts of employee dishonesty and disloyalty would over-criminalize what are, in essence, civil claims:

> With the broadening of the scope of the statute [18 U.S.C. § 1346] to cover intangible harms, however, has come a certain amount of confusion and controversy over the outer boundaries of wire fraud. *In particular, premising a felony solely on a scheme to defraud an employer of the loyal services of his employee has spawned a fierce debate about potential over-criminalization of employer-employee breakdowns, better handled in the civil courts. Carried to its logical extreme, such a theory would criminalize any intentional undisclosed breach of duty to an employer.*

Id. (emphasis added).

When emphasizing its objective *not* to "criminalize [every] intentional undisclosed breach of duty to an employer," *id.*, the D.C. Circuit added that:

> [I]f merely depriving the victim of the loyalty and faithful service of his fiduciary constitutes criminal fraud, the ends/means distinction is lost. *Once the ends/means distinction is abolished and disloyalty alone becomes the crime, little remains before every civil wrong is potentially indictable.*

Id. at 1336 n.11 (emphasis added) (quoting Coffee, *From Tort to Crime: Some Reflections on the Criminalization of Fiduciary Breaches and the Problematic Line Between Law and Ethics*, 19 Am. Crim. L. Rev. 117, 167 (1983)); *see also* Pet. App. 22-23 ("In the private sector context, § 1346 poses special risks. Every material act of dishonesty by an employee deprives the employer of that worker's 'honest services,' yet not every such act is converted into a federal crime by the mere use of the mails or interstate phone system.").

Other circuit courts have followed *Lemire*'s reasoning to limit the scope of § 1346 to instances where the defendant intended or reasonably contemplated identifiable harm to befall the victim of the fraudulent scheme. For instance, in *United States v. Frost*, 125 F.3d 346 (6th Cir. 1997), University of Tennessee professors allegedly conferred advanced university degrees upon certain students in return for lucrative government contracts, thus depriving the University of Tennessee of its intangible right to the honest services of its professors. Relying upon *Lemire*, the Sixth Circuit recognized the circumscribed application of § 1346 in the private context:

> The prosecution must prove that the employee intended to breach a fiduciary duty, *and that the employee foresaw or reasonably should have foreseen that his employer might suffer an economic harm as a result of the breach.* We therefore adopt the standard employed by the District of Columbia Circuit, which holds that *an employee deprives his employer of honest services when "the defendant might reasonably have contemplated some concrete business harm to his employer stemming from his failure to disclose the conflict along with any other information relevant to the transaction."* [*Lemire*, 720 F.2d at 1337.] *Proof that the employer simply*

> *suffered only the loss of the loyalty and fidelity of the defendant is insufficient to convict.* See id.

Id. at 368 (emphases added).[13]

But such "identifiable harm" refers to consequences resulting directly from the fraudulent scheme — not potential harm arising from an eventual discovery of the scheme. For instance, in *United States v. Cochran*, 109 F.3d 660 (10th Cir. 1997), the defendant was charged with, *inter alia*, depriving a client of his company's honest services when collecting an undisclosed broker fee. The court, acknowledging that a "scheme to defraud focuses on the intended end result," emphasized that § 1346 cannot apply to unremarkable breach of fiduciary duty claims:

> Assuming without deciding that § 1346 has application where a private actor or quasi-private actor is deprived of honest services in the context of a commercial transaction, *it would give us great pause if a right to honest services is violated by every breach of contract or every misstatement made in the course of dealing.*

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13. The court found that the record evidence was sufficient to support the honest services fraud convictions because

> all defendants intended, much less reasonably contemplated, that the University would suffer a concrete business harm by unwittingly conferring an undeserved advanced degree on each student defendant.

125 F.3d at 369. In contrast, the Independent Counsel proffered no evidence that either Douglas or Lake intended or reasonably foresaw any intangible harm befalling Lake's employers.

Id. at 664, 667 (emphasis added) (citations omitted). The Tenth Circuit then reversed the defendant's wire fraud convictions because "[n]o evidence independent of the alleged scheme suggests in any way that [the defendant] sought to harm [the purported victims]." *Id.* at 669; *see also United States v. Jain*, 93 F.3d 436, 441 (8th Cir. 1996) ("the government must show that some actual harm or injury was *contemplated* by the schemer") (emphasis in original); *United States v. D'Amato*, 39 F.3d 1249, 1257 (2d Cir. 1994) ("Because the defendant must intend to harm the fraud's victims, '[m]isrepresentations amounting only to a deceit are insufficient to maintain a mail or wire fraud prosecution.' ") (citation omitted). Significantly, the court reached this holding even though the undisclosed fees, when discovered, could have resulted in adverse tax consequences to the client. *See* 109 F.3d at 668-69.

Even in a case addressing honest services fraud in the public context, the Fifth Circuit confirmed the narrow reach of § 1346. In *United States v. Czubinski*, 106 F.3d 1069 (5th Cir. 1997), the defendant allegedly "browsed" without authorization confidential taxpayer information retained by the Internal Revenue Service ("IRS"). Reversing the defendant's wire fraud conviction because of the lack of evidence that he engaged in any "self-dealing" rising to the level of criminally fraudulent conduct, the court cautioned that:

> "To allow every transgression of . . . governmental obligations to amount to mail fraud would effectively turn every such violation into a federal felony; this cannot be countenanced." [*United States v. Sawyer*, 85 F.3d 713, 728 (1st Cir. 1996).] Here, the threat is one of transforming governmental workplace violations into felonies. We find no evidence that Congress intended to create what amounts to a draconian personnel regulation. We

> hesitate to imply such an unusual result in the absence of the clearest legislative mandate.
>
> * * *
>
> Even if the IRS were a private employer, . . . the pre-McNally honest services convictions involving private fraud victims indicate that *there must be a breach of a fiduciary duty to an employer that involves self-dealing of an order significantly more serious than the misconduct at issue here.*

106 F.3d at 1077 (emphasis added) (citations omitted).

In contrast to this well-established precedent, the Independent Counsel neither argued, nor proffered any evidence at trial to support a conclusion, that either Douglas or Lake contemplated any harm to RLSM and/or Bozell. Despite the absence of this essential evidence, the Court of Appeals affirmed the convictions. To reach this result, the Court of Appeals assumed, without directly addressing the question, that the reasonable foreseeability of possible harm resulting from an eventual *discovery* of the alleged fraudulent conduct is sufficient to convict a defendant of "honest services" fraud. *See* Pet. App. 23 ("There is no doubt that Douglas and Lake could have foreseen that their actions would cause substantial economic harm to RLSM *once word of the scheme got out.*") (emphasis added). To be certain, however, it is difficult, if not impossible, to posit a scenario where the discovery of an employee's breach of fiduciary duty would not in some way harm the employer through bad publicity, increased security/control costs, loss of employee time and/or morale, employee replacement costs, *etc.* Accordingly, the Court of Appeals' holding — rendering virtually all breaches of fiduciary duty in the private context criminal violations — conflicts with the

federal circuits' respective efforts to narrow the scope, and limit the "outer boundaries," of "honest services" fraud. *Lemire*, 720 F.2d at 1336.

Finally, the Court of Appeals' holding establishes what it purports to prevent, *i.e.*, an anomalous situation in which "especially elusive criminals, whose apprehension is *ex ante* relatively unlikely, [are] in a better legal position than clumsy ones[.]" Pet. App. 24. This is because, under the Court of Appeals' interpretation of § 1346, a prosecutor may not be able to satisfy the "identifiable harm" standard in the case of a complex, intricately disguised fraud where the discovery of the crime was not reasonably foreseeable. Congress, of course, did not intend to reward ingenious criminals who plan their crimes carefully to avoid detection while punishing only the clumsy.

B. This Issue Raises An Important Federal Question.

Under the Court of Appeals' holding, only the discretion of a prosecutor prevents a *criminal* sanction for ordinary breach of fiduciary duty cases arising in the private context. Of course, this result erases the line between civil and criminal conduct, thereby criminalizing what are otherwise civil wrongs. Indeed, the Courts of Appeals addressing this issue have repeatedly sought to prevent this precise result. *See, e.g.*, *Lemire*, 720 F.2d at 1336 ("premising a felony solely on a scheme to defraud an employer of the loyal services of his employee has spawned a fierce debate about potential over-criminalization of employer-employee breakdowns, better handled in the civil courts"); *Frost*, 125 F.3d at 368 ("Proof that the employee simply suffered only the loss of the loyalty and fidelity of the defendant is insufficient to convict.") (citing *Lemire*, 720 F.2d at 1337); *Cochran*, 109 F.3d at 667 ("it would give us great pause if a right to honest services is violated by every breach of contract or every misstatement made in the course of dealing");

D'Amato, 39 F.3d at 1257 ("[m]isrepresentations amounting only to a deceit are insufficient to maintain a mail or wire fraud prosecution") (citation omitted); *Czubinski*, 106 F.3d at 1077 ("To allow every transgression of . . . governmental obligations to amount to mail fraud would effectively turn every such violation into a federal felony; this cannot be countenanced.") (quoting *Sawyer*, 85 F.3d at 728).

Accordingly, Supreme Court review and a remand[14] on this issue is necessary to reconcile the Court of Appeals' holding with the circuit courts' respective interpretations of the "honest services" fraud statute.

CONCLUSION

For the foregoing reasons, Sun-Diamond respectfully requests that this Court grant the cross-petition.

Respectfully submitted,

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14. *See* Pet. App. 20.

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No. 98 - 374

IN THE

Supreme Court of the United States

October Term 1997

Sun-Diamond Growers of California,
Cross-Petitioner,

v.

United States of America,
Cross-Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI

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SUMMARY OF THE ARGUMENT

Sun-Diamond's Cross-Petition for Writ of Certiorari presents no matters meriting review by this court. The issue of how the responsibility and knowledge of corporate officers should be imputed to a corporation is an esoteric question of general common law for which Sun-Diamond does not even attempt to identify a circuit split. The issue of what constitutes identifiable harm in the context of a wire fraud prosecution for deprivation of honest services likewise presents neither an important federal question, nor a circuit conflict, since Sun-Diamond concedes that all of the circuits that have considered the issue have done so correctly, and merely argues that the D.C. Circuit in the present case misread its own precedent. The Cross-Petition should therefore be denied.[1]

REASONS FOR DENYING THE WRIT

I. The Imputation Question Does Not Merit Certiorari Review

Sun-Diamond first urges this Court to consider the imputation of corporate responsibility and knowledge under the wire fraud statute.[2] It identifies nothing in the decision below meriting certiorari review.

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[1] It perhaps should be noted at the outset that there is no overlap between the Government's pending Petition for Writ of Certiorari and Sun-Diamond's Cross-Petition. The two address separate convictions under different statutes on distinct sets of facts. The Government's Petition concerns a conviction under 18 U.S.C. § 201(c)(1)(A) for illegal gratuities given to Secretary of Agriculture Espy. Sun-Diamond's Cross-Petition concerns a conviction under 18 U.S.C. § 1343 for wire fraud committed as part of a scheme to channel illegal contributions to the election campaign of the Secretary's brother. Likewise, the legal issues raised in the Petition and the Cross-Petition are wholly distinct.

[2] Cross-Pet. at pp. 10 -15, addressing Decision, Pet. App. at pp. 16-19. (In conformance with the Cross-Petition, the Government will cite to the

Sun-Diamond's statement of this issue is particularly puzzling, because it appears to have very little to do with the Court of Appeals' decision. In its statement of Questions Presented, Sun-Diamond asks whether a court deprives a criminal defendant of due process when it makes a ruling precluding a jury finding that the victim was actually a perpetrator.[3] But nowhere in its Cross-Petition does Sun-Diamond identify any ruling of either the District Court or the Court of Appeals that *precluded* the jury from finding as it did. Indeed, Sun-Diamond has not attacked the jury instructions that underlie its conviction, either in the Court of Appeals or here. Its argument therefore cannot be that the jury was *precluded* from finding in its favor on this issue, but rather that the jury should have found differently than it did, a matter clearly not meriting certiorari review.

Sun-Diamond does not even attempt to suggest that there is a split of authority among the circuits on this issue. It does not cite a single decision contrary to the one it is challenging; instead, it simply asserts that "the Court of Appeals created a distinction no other Circuit has seen fit to adopt." Cross-Pet. at p. 11. Nor, for that matter, does Sun-Diamond identify any authority supporting its position. Rather, it reports that it "has been unable to find . . . any authority describing the purported distinctions between perpetrators and victims in applying corporate imputation principles." Cross-Pet. at p. 12.

Indeed, Sun-Diamond does not point to any court, federal or state, that has ever had to address the peculiar fact situation that brought the imputation question before the

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version of the decision below included in the appendix to the Government's Petition for Certiorari.)

[3] "Whether a court deprives a criminal defendant corporation of due process of law when concluding that a *prosecutor's* classification of an entity as a 'victim' of an alleged fraud precludes a finding by a jury that the entity was actually a perpetrator under vicarious liability principles — thereby allowing the *prosecutor*, rather than the jury, to resolve a critical issue of fact?" Questions Presented, Cross-Pet. at p. i (emphasis in original).

Court of Appeals. Far from raising an important federal question, Sun-Diamond appears to be pursuing a question of general common law that has arisen in a unique factual setting.

Sun-Diamond nevertheless argues that the Court of Appeals committed an error of constitutional dimension when it held that there need not be a strict symmetry between the rule governing imputation of criminal liability to a corporate perpetrator for the acts of its agent, and the rule governing the imputation to a corporate victim of the knowledge of its agent.[4] The constitutional argument is a new one, presented for the first time to this Court. Before the Court of Appeals, "Sun-Diamond [did] not invoke the Constitution, which in any event would require either an overruling of the Supreme Court's rejection of a due process attack on corporate liability, *New York Cent. & Hudson River R.R. Co. v. United States*, 212 U.S. 481, 29 S.Ct.

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[4] Although this Court has no occasion to reach the merits of this issue, it is worth noting that the Court of Appeals' decision fully accorded with "general agency principles" — which, according to Sun-Diamond (Cross-Pet. at p. 12), are what govern here. An employer may be subject to criminal penalties for the act of a managerial person acting within the scope of employment, as Sun-Diamond's vice-president Douglas was doing. Restatement (Second) of Agency § 217 D, cmt. d (1958). On the other hand, if an agent has done an unauthorized act, as RLSM and Bozell's agent Lake did, then the principal is not affected by the agent's knowledge of the act. Restatement (Second) of Agency § 280 (1958). Thus, since unauthorized acts can be within an agent's scope of employment, it was entirely possible as a legal matter for Sun-Diamond to commit a fraud through its agent Douglas, who was acting within the scope of his employment, and at the same time for RLSM and Bozell to be defrauded by these activities, even though their disloyal agent Lake, who had not been authorized to make illegal campaign contributions, was aware of them. Compare, Sun-Diamond's authority *United States v. One Parcel of Land Located at 7326 Highway 45 North*, 965 F.2d 311, 316 (7th Cir. 1992), which holds that *only* knowledge obtained by an agent acting within the scope of employment is imputable, but not that *all* knowledge obtained by an agent acting within the scope of employment is imputable.

304, 53 L.Ed. 613 (1909), or the development of some new theory." Decision, Pet. App. at p. 18.

In pressing its new due process argument before this Court, Sun-Diamond never identifies the due process principle it thinks was violated. It does not point to a legal ruling of the district court, or to a jury instruction to which it objected, that barred it from presenting any legitimate defense at trial. Rather, Sun-Diamond disputes the jury's conclusion that it did, in fact, commit wire fraud to the detriment of RLSM and Bozell, and excoriates the Court of Appeals for not overturning the jury's determination of the facts in this case. Having failed to convince the Court of Appeals to substitute a new finding of facts for the jury's, it implores this Court to do so.[5]

In reality, as the Court of Appeals expressly held, there was a more than sufficient factual basis in the record for the jury to conclude that Douglas was acting to benefit Sun-Diamond — i.e., that he was acting within the scope of his employment — and that Sun-Diamond was, therefore, a perpetrator rather than a victim.[6] While Sun-Diamond asserts

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[5] The closest Sun-Diamond comes to identifying the due process problem that it wants this court to address is to allude to a supposed "inconsistency" in the Government's prosecution. It cites no authority for the proposition that a prosecutorial inconsistency rises to the level of a due process violation. But this Court would have no occasion to consider that issue here, because Sun-Diamond cannot point to any inconsistency. Instead, it complains that, although the Government prosecuted only Sun-Diamond, it "retained the right to prosecute Lake's firm" at an early stage of the investigation. Cross-Pet. at p. 13. But retaining this right following a single defendant's guilty plea — a right that the Government never exercised — was an act of prudence, not inconsistency, in light of the inherent uncertainty about what facts the investigation might ultimately reveal.

[6] "The facts in the record, however — that Douglas hid the illegal contribution scheme from others at the company and used company funds to accomplish it — do not preclude a valid finding that he undertook the scheme to benefit Sun-Diamond. Part of Douglas's job was to cultivate his, and Sun-Diamond's, relationship with Secretary Espy. By responding

that the Court of Appeals was "apparently bound by the Prosecutor's initial classification of Sun-Diamond as a perpetrator," Cross-Pet. at p. 13 (emphasis omitted), the Court of Appeals actually made a routine ruling that the evidence was sufficient to sustain the verdict that the jury reached.

Indeed, Sun-Diamond concedes that "[t]he flaw of the Court of Appeals' reasoning lies *not* in its declaration that the imputation rules are different for the perpetrator and the victim." Cross-Pet. at p. 15 (emphasis added). But that is the only issue of imputation that the Court of Appeals addressed. What Sun-Diamond purports to complain of — the "us[e] of that legal fiction for allocating criminal liability to identify the victim and the perpetrator" (*ibid.*) — is not a legal issue that the Court of Appeals even considered. There thus is simply nothing in the appellate decision below for this Court to review.

II. The "Identifiable Harm from Wire Fraud" Issue Does Not Merit Certiorari Review

Sun-Diamond next asks this Court to look at 18 U.S.C. § 1346, the "honest services" amendment to the wire and mail fraud statutes.[7] Specifically, it argues that the Court of Appeals erred in concluding that the Government established identifiable harm to the fraud victim by offering evidence that the victim would suffer foreseeable injury from exposure of the fraudulent scheme.

Again, the question Sun-Diamond presents for review has little, if anything, to do with the decision of the Court of Appeals. Sun-Diamond ultimately concedes that the

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to the Secretary's request to help his brother, Douglas may have been acting out of pure friendship, but the jury was entitled to conclude that he was acting instead, or also, with an intent (however befuddled) to further the interests of his employer. The scheme came at some cost to Sun-Diamond but it also promised some benefit." Decision, Pet. App. at pp.16-17.

[7] Cross-Pet. at pp. 16-24, addressing Decision, Pet. App. at pp. 22-25.

Government need only show that the defendant "reasonably contemplated" harm to the victim. Cross-Pet. at p. 19. Further, Sun-Diamond admits that the Court of Appeals was correct to conclude that defendant here could foresee harm to the victim. Cross-Pet. at p. 22. While Sun-Diamond does not like the jury's conclusion, it points to no legal error for this Court to review.

Unlike with its corporate imputation argument, Sun-Diamond at least looks for a circuit split in urging this Court to review this "identifiable harm from wire fraud" issue. It does not, however, find one. Sun-Diamond identifies several decisions from various circuits that supposedly conflict with the decision below.[8] Curiously, the seminal decision of this group, and the one upon which Sun-Diamond most heavily relies, is *United States v. Lemire*, 720 F.2d 1327 (D.C. Cir. 1983), a decision of the D.C. Circuit. All of the other circuits, Sun-Diamond asserts, are aligned with *Lemire*, and therefore at odds with the decision below.

Thus, Sun-Diamond does not complain of a circuit split; according to its argument, all of the circuits that have addressed the issue (including the D.C. Circuit in *Lemire*) are completely in accord. Rather, Sun-Diamond argues that the decision below conflicts with the Circuit's own earlier decision in *Lemire*.

But in the present case, the D.C. Circuit did not deviate from *Lemire*. To the contrary, it expressly adhered to *Lemire*, and cited that earlier decision repeatedly. *See*, Decision, Pet. App. at pp. 22-25. Indeed, according to Sun-Diamond, the key holding of *Lemire*, which it quotes twice in its Cross-Petition, is that Congress did not intend to "criminalize [every] intentional undisclosed breach of duty to an

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[8] *United States v. Lemire*, 720 F.2d 1327 (D.C. Cir. 1983); *United States v. Cochran*, 109 F.3d 660, 667-68 (10th Cir. 1997); *United States v. Jain*, 93 F.3d 436, 441-42 (8th Cir. 1996), *cert. denied*, 117 S.Ct. 2452 (1997); *United States v. Frost*, 125 F.3d 346 (6th Cir. 1997); *United States v. Czubinski*, 106 F.3d 1069 (1st Cir. 1997).

employer." Cross-Pet. at p. 18. The Court of Appeals below was acutely aware of the policy arguments Sun-Diamond makes here; the court even quoted *Lemire* to the effect that "not every breach of a fiduciary duty works a criminal fraud." Decision, Pet. App. at p. 23 (quoting *Lemire*, 720 F.2d at 1335). Likewise, the Court of Appeals scrupulously adhered to *Lemire*'s direction that "[t]he crucial determination must be whether the jury could infer that the defendant *might reasonably have contemplated* some concrete business harm to his employer . . . ." Decision, Pet. App. at pp. 24-25 (quoting *Lemire*, 720 F.2d at 1337 (emphasis in *Sun-Diamond* decision, not in *Lemire* decision)).

Since the other circuits are in accord with *Lemire*, and since, according to the decision below, *Lemire* is still good law in the D.C. Circuit, even after the decision below, there can be no circuit conflict. Rather, Sun-Diamond argues that one decision of the D.C. Circuit erroneously interpreted an earlier decision of the same circuit. This is a matter for rehearing within the circuit, not for certiorari. (Sun-Diamond unsuccessfully petitioned the Court of Appeals for rehearing *en banc*.)

The potential business harm that the jury found and the Court of Appeals affirmed in the present case was the economic harm that would result to RLSM, a Washington public relations firm, from exposure of the fraudulent campaign contribution scheme. Decision, Pet. App. at p. 23. The Court of Appeals identified specific evidence supporting the conclusion that RLSM was particularly vulnerable to such injury:

> As Lake testified, the chief assets of a public relations firm are its legitimacy and credibility in the eyes of current and potential clients. Both stood to be undermined by Douglas and Lake's actions. There is no doubt that Douglas and Lake could have foreseen that their actions would cause substantial economic harm to RLSM once word of the scheme got out.

Decision, Pet. App. at p. 23.

Lemire, and the other decisions that Sun-Diamond asserts are contrary to the present one, did not identify any comparable evidence. When, as here, a firm's stock-in-trade is the effective and ethical handling of political matters, and the defendant induces the firm's executives to violate the election laws and thereby subject the firm to the risk of injury that exposure would entail, a jury certainly does not act irrationally in finding that the defendant has deprived the firm of the honest services of its employees.

These facts distinguish the present case from, for example, Sun-Diamond's other principal authority, *Czubinski*, *supra*, 106 F.3d 1069. Defendant there, an Internal Revenue Service employee, had browsed confidential taxpayer files, but had done nothing with the information he observed. The Court of Appeals overturned his conviction for wire fraud because neither actual nor potential harm to the public or his employer was shown:

> The conclusive consideration is that the government simply did not prove that Czubinski deprived, or intended to deprive, the public or his employer of their right to his honest services. Although he clearly committed wrongdoing in searching confidential information, there is no suggestion that he failed to carry out his official tasks adequately, or intended to do so.

Id. at 1077.

Sun-Diamond's Cross-Petition thus illustrates that no substantial disagreements regarding the interpretation of § 1346 have developed among the Courts of Appeals since the statute was enacted a decade ago. The development of the law on the subject to date simply gives no occasion for this Court to intervene.

Sun-Diamond also does not argue that the D.C. Circuit wrongly decided any important issue of federal law. Instead,

Sun-Diamond complains that "the Court of Appeals *assumed, without directly addressing the question*, that the reasonable foreseeability of possible harm resulting from an eventual *discovery* of the alleged fraudulent conduct is sufficient to convict a defendant of 'honest services' fraud." Cross-Pet. at p. 22 (emphasis added in part). Sun-Diamond would thus again have this Court address a question that, it concedes, the Court of Appeals did not consider.

Rather than arguing that the Court of Appeals wrongly decided this legal issue, Sun-Diamond merely asserts that the Court of Appeals proceeded from an inappropriate, although accurate, factual assumption. Specifically, while conceding the court was correct when it concluded that "[t]here is no doubt that Douglas and Lake could have foreseen that their actions would cause substantial economic harm to RLSM once word of the scheme got out," Decision, Pet. App. at pp. 23-24, Sun-Diamond says that the court should have looked for a different harm, because injury to reputation is just too commonplace.[9] But, beyond characterizing the harm as too mandane, Sun-Diamond cannot evade the conclusion that, under the facts in this case, the jury found the requisite harm to the victim within the defendant's reasonable contemplation, and the Court of Appeals noted ample evidence to support that conclusion. Since, as Sun-Diamond concedes, this is all the Government needed to show to prove honest services fraud, Sun-Diamond presents nothing for this Court to review.

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[9] "[I]t is difficult, if not impossible, to posit a scenario where the discovery of an employee's breach of fiduciary duty would not in some way harm the employer .... Accordingly, the Court of Appeals' holding ... conflicts with the federal circuits' respective efforts to narrow the scope, and limit the 'outer boundaries,' of 'honest services' fraud." Cross-Pet. at pp. 22-23.

CONCLUSION

Sun-Diamond's Cross-Petition quite effectively demonstrates why certiorari review is unwarranted here. There are no circuit conflicts to resolve, and no important questions of federal law that need answering. Instead, Sun-Diamond asks this Court to wade into esoteric questions of general common law and to weigh in on the interpretation of a federal statute for which the Courts of Appeals have been developing, without difficulty, a consistent body of law. Neither is a valid reason for granting a writ of certiorari.

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In The

Supreme Court of the United States

October Term, 1998

SUN-DIAMOND GROWERS OF CALIFORNIA,

Cross-Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Cross-Respondent.

On Cross-Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR SUN-DIAMOND GROWERS OF CALIFORNIA

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SUMMARY OF THE ARGUMENT

The Independent Counsel does not, because it cannot, address the merits of Sun-Diamond Growers of California's ("Sun-Diamond") arguments. The Independent Counsel's singular response to Sun-Diamond's petition is that the questions presented therein are not worthy of Supreme Court attention. As shown below, however, both questions raise substantial and important legal issues with widespread implications. Moreover, the positions adopted by the Court of Appeals are either at odds with, or extend beyond, the decisions of its sister circuits.

REASONS FOR GRANTING THE CROSS-PETITION

I.

THE COURT OF APPEALS' DECISION ESTABLISHES A NEW VICARIOUS LIABILITY PRINCIPLE THAT UNCONSTITUTIONALLY STRIPS DEFENDANTS OF A CRIMINAL DEFENSE.

The jury, imputing the conduct of Richard Douglas ("Douglas") to Sun-Diamond, convicted the company of defrauding James Lake's ("Lake") employers, Robinson, Lake, Sawyer & Miller ("RLSM") and Bozell Worldwide, Inc. ("Bozell"). At the District Court and again on appeal, Sun-Diamond contended that the jury could not have reached this conclusion because the conduct of Lake — who confessed that *both* Douglas *and he* "deceiv[ed]" and "defrauded" Sun-Diamond[1] — must be imputed to Lake's employers, thereby rendering RLSM and Bozell perpetrators and *not* victims of the alleged scheme to defraud.

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1. J.A., Tab 3 at 432, 469.

Neither the District Court nor the Court of Appeals pointed to any evidence whatsoever that Lake — when coordinating with Douglas and four other members of Lake's public relations firm to make an unlawful corporate, conduit contribution — acted beyond the scope of his employment.[2] In fact, the Court of Appeals found the opposite to be true when recognizing that Douglas and Lake *both* "occupied high-level management positions in their respective firms, and both men's firms sought to establish good relations with Secretary Espy." Pet. App. 18. The Court of Appeals also recognized — as is readily apparent by the facts here — that "Sun-Diamond does look more like a victim than a perpetrator[.]" Pet. App. 16.

But instead of reversing Sun-Diamond's conviction on the ground that the Independent Counsel failed to prove a scheme to defraud RLSM and Bozell, or even addressing whether there was sufficient evidence to sustain the jury's verdict, the Court of Appeals held that Sun-Diamond's challenge fails *as a matter of law*, finding that *no* defendant can prove that a purported corporate victim — *as determined by the prosecutor* — was in fact a perpetrator of the alleged fraud because imputation rules do not apply on the "victim side[ ]." Pet. App. 18; *see also* Pet. App. at 19 ("it is not at all clear that imputation on the other side of the equation would be useful. . . ."). In articulating this new, and fundamentally flawed, vicarious liability principle, the Court of Appeals did not analyze *whether* Lake's employers were victims, but instead adopted *in toto* the Independent Counsel's classification as set forth in the Indictment that

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2. The Independent Counsel's suggestion in a footnote, Opp. at 3 n.4, that Lake's knowledge should not be imputed to his employers belies the evidence that Lake, a name partner of his firm, involved four other members of his firm in a scheme that not only benefitted the firm by satisfying a client — *i.e.*, Douglas/Sun-Diamond — but also satisfied the firm's objective of "maintain[ing] good relations with Secretary Espy." Pet. App. 18; *see also* Cross-Pet. at 14.

Lake's employers were victims. By adopting (without citation or reference to evidence) the Independent Counsel's identification of RLSM and Bozell as "victims," and then by holding that Lake's conduct cannot be imputed to RLSM and Bozell because they were victims, the Court of Appeals impermissibly transformed an issue of fact (*whether* Lake's employers were victims) into an irrebuttable presumption.[3]

Instead of addressing Sun-Diamond's arguments concerning the legal and policy implications of the ruling below,[4] the Independent Counsel mischaracterized the issue raised here when arguing that the trial evidence supports a finding that Douglas acted on behalf of Sun-Diamond. Even assuming *arguendo* that there was sufficient evidence from which the jury could have found that Douglas acted on behalf of his employer, the issue raised on appeal was whether the jury could (and should) have concluded beyond a reasonable doubt that *Lake* acted on behalf of *his* employers. Sun-Diamond challenges the Court of Appeals' conclusion of law that agency principles do not apply when determining whether an entity identified as a victim by the prosecutor was indeed a perpetrator.[5]

---

3. As the Court of Appeals was the first and only court to adopt this victim/perpetrator distinction in the application of imputation law — and the first court to deny a defendant the defense that a corporate "victim" was in fact a perpetrator — Sun-Diamond had no opportunity to raise its due process argument in the lower courts.

4. *See* Cross-Pet. at 10-15.

5. The Independent Counsel emphasizes the fact that Sun-Diamond does not point to a split in the circuits concerning this issue. As the Court is well aware, however, a circuit split is not a prerequisite to Supreme Court review. *See* S. Ct. R. 10(c). This issue raises an important question of first impression that (1) concerns imputation principles under federal common law; and (2) raises due process concerns that certain defendants charged with fraud are denied a legal defense.

Accordingly, the Independent Counsel's argument that there "is simply nothing in the appellate decision below for this Court to review" is, at best, confused. The Court of Appeals, in no uncertain terms, held that Sun-Diamond's fraud convictions should not be reversed even "assuming" that Lake acted within the scope of his employment:

> *Even assuming the evidence showed the balance of private and corporate purpose in Douglas's and Lake's motivation to be identical, Sun-Diamond's argument rests on a faulty assumption — that the imputation rules must be the same on both the perpetrator and victim sides. They need not be, and indeed are not.* Imputation is a legal fiction designed to assist in the allocation of liability, not a literal description of the state of a principal's knowledge. The law imputes the wrongdoer's conduct to the corporation in order to encourage monitoring, but it is not at all clear that imputation on the other side of the equation would be useful in eliciting additional caution on the part of would-be fraud victims.

Pet. App. 18-19 (emphasis added). The *legal* issue raised here is whether the Court of Appeals' holding unconstitutionally precludes criminal defendants from arguing that a purported corporate victim was in fact a perpetrator.

This issue raises important due process concerns worthy of Supreme Court review. As this Court is well aware, the federal wire and mail fraud statutes are far-reaching and are invoked frequently by prosecutors across the nation. Especially in light of the so-called "honest services" statute, 18 U.S.C. § 1346, prosecutors commonly allege that the victim of a defendant's scheme to defraud is a corporate principal, typically

an employer. *See, e.g.*, discussion *infra* in part II; Cross-Pet. at 16-24. The prosecutor, of course, has the burden of proving beyond a reasonable doubt this scheme to defraud. Accordingly, a defendant, in rebutting this element in a fraud prosecution, should be permitted to present to a jury the defense that the alleged victim was in fact a perpetrator if an agent of the "victim" participated — within the scope of his agency relationship — in the alleged scheme to defraud. Without an intended victim there can be no scheme to defraud.[6]

By stripping Sun-Diamond of this legal defense, the Court of Appeals subjects defendants like Sun-Diamond to overcharged fraud prosecutions and fundamentally unfair felony sentences for what may not even amount to felonious conduct. For this reason, the Court should review and reverse Sun-Diamond's fraud convictions.

II.

THE COURT OF APPEALS' INTERPRETATION OF THE "IDENTIFIABLE HARM" STANDARD FOR A CONVICTION BASED UPON SO-CALLED "HONEST SERVICES" FRAUD CREATES A SPLIT IN THE CIRCUITS.

Neither the District Court nor the Court of Appeals found that Douglas or Lake intended to harm RLSM or Bozell. Nor did the lower courts find that "identifiable harm" to the purported victims was a foreseeable result of the actual scheme. Instead, the District Court and the Court of Appeals found that

6. As this case concerned Federal Election Campaign Act violations — *and the only property stolen belonged to Sun-Diamond* — it is not surprising that the Independent Counsel had trouble finding a "victim" of conduct that in reality amounted to an unlawful campaign contribution. *See, e.g.*, J.A., Tab 3 at 432, 469; Cross-Pet. at 4-5.

the "identifiable harm" standard was satisfied, and Sun-Diamond's wire fraud convictions could be sustained, because, in their view, it should have been reasonably foreseeable to Lake and Douglas that RLSM and Bozell might suffer harm in the event Douglas and Lake were caught, and the fraud discovered. Pet. App. 23. This attenuated reading of the "identifiable harm" principle runs afoul of the well-established precedent that "not every breach of a fiduciary duty works a criminal fraud,"[7] and conflicts with the holdings of all other circuit courts that have addressed the "identifiable harm" standard of so-called "honest services" fraud. *See* 18 U.S.C. § 1346.

The Independent Counsel makes two conclusory assertions when opposing Sun-Diamond's cross-petition on this issue: (1) there is "no legal error for this Court to review"; and (2) there is "no circuit conflict." Opp. at 6, 7. To the extent that these assertions are even supported by argument, they rest upon flawed reasoning.

Despite the Independent Counsel's argument to the contrary, Sun-Diamond has plainly articulated the legal issue raised here. The Court of Appeals affirmed Sun-Diamond's fraud convictions because "[t]here is no doubt that Douglas and Lake could have foreseen that their actions would cause substantial economic harm to RLSM *once word of the scheme got out*." Pet. App. 23 (emphasis added). Unlike the other "honest services" cases discussed in the cross-petition[8] — the Court of Appeals held that a jury needs to find merely that the defendant could reasonably foresee that the alleged victim of a scheme to defraud may suffer hardship *if the scheme were*

7. *United States v. Lemire*, 720 F.2d 1327, 1335 (D.C. Cir. 1983); *see also* cases cited *infra* at n.11.

8. Cross-Pet. at 17-23.

discovered. The question raised here is thus whether, as a matter of law, the Court of Appeals correctly interpreted the "identifiable harm" element of wire fraud. In other words, this Court should determine whether the forseeability of certain adverse, economic consequences to the alleged victim of a scheme to defraud resulting from an eventual *discovery* of the fraud is sufficient to sustain a fraud conviction, even if the defendant neither intended nor reasonably contemplated *any* harm befalling the alleged victim as a direct result of the scheme.[9]

Nor does the Independent Counsel even address Sun-Diamond's argument that the Court of Appeals' standard criminalizes virtually every breach of fiduciary duty. *See* Cross-Pet. at 22-23. This is not surprising because the Independent Counsel cannot dispute that virtually all breaches of fiduciary duty inevitably result in some economic harm where the breach is eventually discovered.[10] *See id.* Instead of addressing this

9. In its attempt to attribute certain concessions to Sun-Diamond that Sun-Diamond never made, the Independent Counsel mischaracterizes Sun-Diamond's argument as contending that the government must prove more than mere "injury to reputation" to sustain a fraud conviction. Opp. at 9 ("Sun-Diamond says that the court should have looked for a different harm, because injury to reputation is just too commonplace."). Sun-Diamond acknowledges that an intent to injure another's reputation can satisfy the "identifiable harm" standard. But whether a purported victim may suffer harm if the fraud is unintentionally discovered broadens the fraud statute to encompass virtually every breach of fiduciary duty. This result runs contrary to the express policy curtailing the scope of "honest services" fraud articulated by the various circuit courts addressing this issue.

10. Thus, while the Court of Appeals acknowledges the policy underlying the "identifiable harm" standard — *i.e.*, to limit the scope of "honest services" fraud to prevent a situation under which all civil breaches of fiduciary duty become criminal violations — the effect of the Court of Appeals' holding renders the boundaries of "honest services" fraud virtually limitless. *See* Pet. App. 23.

recognized policy concern, the Independent Counsel attempts to minimize Sun-Diamond's arguments by asserting that there is no circuit split on this issue.

But the reasoning underlying the Independent Counsel's claim that Sun-Diamond has not pointed to a circuit split is facially contradictory. While acknowledging that "the other circuits are in accord with *Lemire*," the Independent Counsel curiously asserts — in the same paragraph — that Sun-Diamond merely argues that the Court of Appeals "erroneously interpreted an earlier decision of the same circuit," *i.e.*, *Lemire*. Opp. at 7. Of course, if the Court of Appeals' decision conflicts with *Lemire*, the Court of Appeals' decision also conflicts with at least the five other circuit courts — *i.e.*, the First, Second, Sixth, Eight and Tenth circuits[11] — that the Independent Counsel concedes have adopted *Lemire*'s "identifiable harm" standard. Accordingly, the question raised here is not limited to "a matter for rehearing within the circuit[.]" *Id.* Rather, the Court of Appeals' evisceration of the "identifiable harm" standard conflicts with the decisions of every other circuit court that has reached this issue.

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11. *See United States v. Sawyer*, 85 F.3d 713, 728 (1st Cir. 1996); *United States v. Czubinski*, 106 F.3d 1069, 1077 (1st Cir. 1997); *United States v. D'Amato*, 39 F.3d 1249, 1257 (2d Cir. 1994); *United States v. Frost*, 125 F.3d 346, 368 (6th Cir. 1997); *United States v. Jain*, 93 F.3d 436, 441 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 2452 (1997); *United States v. Cochran*, 109 F.3d 660, 664, 667 (10th Cir. 1997).

CONCLUSION

For the foregoing reasons, Sun-Diamond respectfully requests that this Court review the two questions presented in its cross-petition.

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